(1)

No. 87-1488

In The

Supreme Court of the United States

October Term, 1988

ARTHUR J. BLANCHARD,

Petitioner,

v.

JAMES BERGERON, SHERIFF CHARLES FUSELIER, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, BARRY BREAUX, OUDREY GROS, JR., DARRELL REVERE, OUDREY'S ODYSSEY LOUNGE, GHI INSURANCE COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT

EDMOND L. GUIDRY, III
GUIDRY & GUIDRY
Attorneys at Law
324 South Main Street
St. Martinville, La. 70582
Telephone: (318) 394-7116

Attorney of Record for James Bergeron and Sheriff Charles Fuselier

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

18 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

Plaintiff-appellant, Arthur Blanchard, originally filed a petition in Federal District Court for the Western District of Louisiana (Lafayette Division) alleging violations of his civil rights under 42 U.S.C. 1983, by Deputy James Bergeron, Sheriff Charles Fuselier and the St. Martin Parish Sheriff's Department. He joined with his civil rights claim, a state law negligence claim against the aforementioned and the owners, and a manager of Oudrey's Odyssey Lounge and Oudrey's Odyssey Lounge. After a trial by jury, the plaintiff was awarded FIVE THOUSAND AND NO/100 ($5,000.00) DOLLARS in punitive damages against Deputy Bergeron and FIVE THOUSAND AND NO/100 ($5,000.00) DOLLARS in compensatory damages against Deputy Bergeron, Sheriff Charles Fuselier and Oudrey's Odyssey Lounge. A Judgment was entered consistent with the jury verdict and plaintiff was awarded attorney fees to be later fixed by the Court.

Pursuant to the Court's order, plaintiff's counsel submitted time, cost and expense records in support of his claim for THIRTY SIX THOUSAND SEVEN HUNDRED EIGHTY AND NO/100 ($36,780.00) DOLLARS in attorney fees and FIVE THOUSAND FIVE HUNDRED ELEVEN AND 92/100 ($5,511.92) DOLLARS of expenses. Defendant vigorously opposed an attorney's fees award of this magnitude under these circumstances. The Trial Court was furnished with the deposition of the plaintiff's attorney which showed excessive, redundant and otherwise unnecessary hours billed. Through the deposition, defendant discovered that plaintiff's attorney had accepted the case on referral with a forty percent (40%) contingency fee. After a very detailed review of billing

and cost records furnished by plaintiff's counsel, the trial court held that a reasonable number of hours to handle this case was 97 hours 20 minutes (96 hours by plaintiff's counsel, Mr. Rosen and 1 hour 20 minutes by Mr. Rosen's associate, Ms. Dombourian). The Court found that ONE HUNDRED AND NO/100 ($100.00) DOLLARS per hour was a reasonable hourly rate and therefore arrived at a "lodestar" of NINE THOUSAND SEVEN HUNDRED TWENTY AND NO/100 ($9,720.00) DOLLARS. However, due to plaintiff's abuse of "billing judgment", the elemental nature of the litigation and the contingency fee arrangement, the trial court adjusted the "lodestar" down to SEVEN THOUSAND FIVE HUNDRED AND NO/100 ($7,500.00) DOLLARS. The trial court awarded cost and expenses of EIGHT HUNDRED EIGHTY SIX AND 92/100 ($886.92) DOLLARS. From this judgment the plaintiff appealed.

The district court made a factual finding that the appellant and his attorney entered into a forty percent (40%) contingency fee agreement. The Fifth Circuit, having found that this factual finding was not erroneous and was supported by the appellant's trial counsel's deposition, held that the contingency fee agreement "serves as a cap on the amount of attorney's fees to be awarded." *Blanchard v. Bergeron*, 831 F. 2d 563, 564 (5th Cir. 1987). The Court further found that "any hours billed by law clerks or paralegals would also naturally be included within the contingency fee." *Blanchard*, supra. From this judgment the appellant applied for a writ of certiorari.

Appellant's writ application was granted on June 27, 1988.

SUMMARY OF ARGUMENT

The Fifth Circuit's decision to limit the plaintiff's recovery of attorney's fees to the amount which he had contracted to pay his attorney under a contingency fee contract will prohibit a windfall to the plaintiff or his attorney without acting as a disincentive to the handling of other civil rights cases upon different contractual terms. The Civil Rights Attorney's Fees Awards Act of 1976 was passed by Congress to foster the enforcement of the Civil Rights Act by means of fee shifting. In passing on the cost of prosecution from the victim to the violator, Congress showed a grave concern that civil rights defendants would be taken advantage of through the lack of billing judgment of civil rights plaintiffs and their attorneys.

Congress acknowledged the standards set out in *Johnson v. Georgia Highway Express*, 488 F. 2d 714 (5th Cir. 1974) as the appropriate standard by which an attorney's fees award should be governed. The Johnson court held that although the agreement which exists between a plaintiff and his attorney is not dispositive of the reasonableness of a fee, in no event should the litigant be awarded a fee greater than he is contractually bound to pay. Congress' acknowledgment of such a limit may be found in the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976. To assist private citizens in asserting their civil rights and to prevent those who

violate the nation's fundamental laws from proceeding with impunity, civil rights plaintiffs should be able to recover "what it costs them" to vindicate their rights. Senate Report Number 94-1011, p. 2 (1976) reprinted at U.S. Code Congressional and Administrative News 1976, p. 5908 (hereinafter S. Report). Allowing recovery by the plaintiff of what prosecution "cost them" prevents a windfall without conflicting with the decision of this court in *City of Riverside v. Rivera*, 477 U.S. 561, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986).

This Court in *City of Riverside*, supra, was not willing to accept a blanket rule limiting attorney's fees in civil rights cases to a proportion of the damages awarded. Contingency fee arrangements which make legal services available in ordinary personal injury cases would not necessarily encourage lawyers to accept all meritorious civil rights cases as many involve substantial expenditures of time and effort, but produce only small monetary recoveries. Certainly this Court did not intend to prevent a civil rights plaintiff from contracting with his attorney for the payment of attorney's fees based on a specified percentage of the recovery. In such a case, the defendant should not be required to pay more than the plaintiff is contractually bound to pay his attorney.

The time billed by law clerks and paralegals is necessarily included within the contingency fee. The Fifth Circuit did not disallow an award for legal support personnel, but rather held that any payments due them was naturally included within the contingency fee. The contract does not provide for the additional payment to law students, law clerks or paralegals, and any amount recovered by the plaintiff or his attorney for time billed

by such legal support personnel would be a windfall to the plaintiff. In order to determine whether separate compensation is in order, the Court must first make a determination as to whether or not the services are normally part of the office overhead in the area and thus reflected in normal billing or in the contingency fee as the case may be. *Ramos v. Lamm*, 713 F. 2d 546 (10th Cir. 1983).

ARGUMENT

The Fifth Circuit, in the case at bar, limited the plaintiff's recovery of attorney's fees to the amount which he had contracted to pay his attorney under a contingency fee contract. The trial court found that plaintiff and his counsel had entered into a contingency fee contract providing for attorney's fees equal to forty percent (40%) of the amount collected, i.e. FOUR THOUSAND AND NO/100 ($4,000.00) DOLLARS, (Cert. appendix 14a). The Court accepted this finding as factually supportive and not clearly erroneous. An award of fees in excess of this contractual amount would provide a windfall to the plaintiff or his counsel.

I. LIMITING THE RECOVERY OF ATTORNEY'S FEES TO THE AMOUNT THE PLAINTIFF IS OBLIGATED TO PAY HIS ATTORNEY UNDER A CONTINGENCY FEE CONTRACT WILL PROHIBIT WINDFALLS TO ATTORNEYS WITHOUT ACTING AS A DISINCENTIVE TO THE HANDLING OF CIVIL RIGHTS CASES UPON DIFFERENT CONTRACTUAL TERMS.

In 1976, Congress amended 42 U.S.C. 1988 "to allow courts to provide the familiar remedy of reasonable counsel's fees to prevailing parties in suits to enforce the Civil

Rights Acts which Congress has passed since 1866." S. Reports p. 2. "Congress enacted Section 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process." *City of Riverside v. Rivera*, 477 U.S. 561, 106 S. Ct. 2686 (1986). Congress' intent to provide legal assistance to less fortunate citizens is evident in the legislative history of the amendments to 42 U.S.C. 1988.

> "In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. Those private citizens are to be able to assert their civil rights, and if those who violate the nations fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." S. Reports, supra, p. 2.

While Congress fully intended to make the representation of the less fortunate attractive, they clearly intended to do so without providing windfalls to attorneys. S. Report, supra, p. 6.

A. 42 U.S.C. 1988 IS THE MECHANISM DESIGNED BY CONGRESS TO SHIFT THE ECONOMIC BURDEN OF PROSECUTING CIVIL RIGHTS VIOLATIONS FROM THE VICTIM TO THE VIOLATOR.

In order to attract competent counsel to handle civil rights cases, it was necessary that they be allowed to recover reasonable attorney's fees for the successful prosecution of civil rights claims. The legislative history of Senate Bill 2278 clearly indicates that the amendment to 42 U.S.C. 1988 was intended as a fee shifting provision,

i.e. a mechanism by which to shift the costs of prosecution from the victim to the violator. "If private citizens are to be able to assert their civil rights, and if those who violate the nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover *"what it costs them"* to vindicate these rights in court." S. Report, p. 2, (Emphasis added). Since a successful plaintiff would be able to recover his attorney's fees from a civil rights defendant, Congress felt that safeguards were necessary to protect against the possibility of excess fee awards.

This Court in *City of Riverside v. Rivera*, 477 U.S. 561, 106 S. Ct. 2686 recognized a few of the safeguards designed to protect civil rights defendants. This Court indicated that under *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983), the District Court has the discretion to deny fees to prevailing plaintiffs under special circumstances. Under *Christiansburg Garment Company v. EEOC*, 434 U.S. 412, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978), the District Court has the discretion to award attorney's fees against plaintiffs who litigate frivolous or vexatious claims. This Court has most recently held that a civil rights defendant is not liable for attorney's fees incurred after a pre-trial settlement offer where the Judgment recovered by the plaintiff is less than the pre-trial offer. *Marek v. Chesney*, 473 U.S. 1, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985).

Congress cited *Johnson v. Georgia Highway Express*, 488 F. 2d 714 (5th Cir. 1974) as the appropriate standards by which an attorney's fees award should be governed. The Johnson court held that although a court's decision concerning the amount of fees to be awarded is not

determined by the agreement which exists between the client and the attorney, "in no event, however, should the litigant be awarded a fee greater than he is contractually bound to pay if indeed the attorneys have contracted as to amount." The Fifth Circuit and Congress were not willing to flatly require that a civil rights defendant pay the fees which a meritorious civil rights plaintiff had agreed to pay his counsel due to the lack of protections and safeguards in such a system. Both the Court and Congress did, however, recognize that a civil rights defendant should not be required to pay more than the plaintiff had contracted to pay his attorney. The fee shifting provision employed by 42 U.S.C. 1988 was designed to provide competent counsel to enforce our civil rights and not as an additional punitive damage provision. This Court has for some time allowed the recovery of punitive damages in particular civil rights cases, *City of Newport, et al v. Fact Concerts, Inc.*, 453 U.S. 245, 101 S. Ct. 2748 (1981). In passing Section 1988, Congress did not intend and the legislative history is void of an indication that Congress intended the provisions of this Section to serve as additional penalties for civil rights violators.

B. AFFIRMATION OF THE FIFTH CIRCUIT'S DECISION IN THIS CASE WILL NOT ACT AS A DISINCENTIVE TO HANDLING CIVIL RIGHTS CASES ON DIFFERENT CONTRACTUAL BASES.

A decision to limit an award of attorney's fees to an amount no greater than that which the plaintiff contracted to pay his attorney would not act as a disincentive to attorneys handling other civil rights cases under different contractual bases. All civil rights attorneys are aware of the provisions of Section 1988 whereby they are allowed

the recovery of reasonable fees for the successful prosecution of civil rights claims. If an attorney contracts with his client to represent him for the court awarded fee or under a straight contingent fee arrangement where his fee is not based on a percentage of recovery, then under *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983), he would be awarded a reasonable fee by the court. If an attorney is willing to accept a case on a contingency to receive a specified percentage of the damages recovered, then the defendant should not be required to pay more than the plaintiff contracted to pay his attorney. There exists no known prohibition against an attorney entering into a contract to receive the greater of a specified percentage of the recovery or the fees as set by the court.

In *Hernandez v. Hill Country Telephone Cooperatives, Inc.*, 349 F. 2d 139 (5th Cir. 1988), the plaintiff entered into an entirely contingent fee contract with his attorney whereby if the plaintiff was not successful, no fee was due; if the suit was successful, but no attorney's fees were awarded, counsel would receive 50% of the sums recovered by the plaintiff; if the court set attorney's fees in an amount less than 50% of the plaintiff's recovery, the plaintiff would add the difference to the fee; if the fees as set by the court equalled or exceeded 50% of the plaintiff's recovery, then the plaintiff would pocket his full recovery and the attorney would take the fees as set by the court. The Fifth Circuit held that this contractual arrangement in a case requiring a substantial investment of attorney time and funds for proper preparation and

trial was not proscribed by either *Johnson* or other of that court's precedence or that it was otherwise an unreasonable arrangement. The contract alluded to in *Hernandez*, supra, allows the attorney to receive a reasonable fee for the successful prosecution of the claim without compelling the defendant to pay a fee in excess of that which the plaintiff had contractually bound himself to pay his attorney. The incentive to handle civil rights cases would not be adversely affected nor would the defendant be required to pay a fee greater than that which the plaintiff contracted to pay his attorney.

C. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF THIS COURT IN *CITY OF RIVERSIDE V. RIVERA*, 477 U.S. 561, 106 S. Ct. 2686 91 L. Ed 2d 466 (1986).

This Court in *City of Riverside v. Rivera*, 477 U.S. 561, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986) held:

> "That a rule limiting attorney's fees in a civil rights case to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting Section 1988."

In *City of Riverside*, supra, this Court affirmed an attorney's fees award of $245,456.25 in a case wherein the plaintiff recovered $33,350.00 in compensatory and punitive damages. This Court indicated that the amount of damages recovered is but one factor which the court must look at to arrive at a reasonable fee. A rule limiting attorney's fees to a proportion of the damages awarded would seriously undermine the purpose of Section 1988. The case at bar differs from *City of Riverside*, supra, in that no mention was made in that case, that the plaintiff

and his attorneys had entered into a contingency fee agreement whereby they agreed to accept the case for a specified percentage of the damages recovered only. By limiting the amount of attorney's fees recoverable to a proportion of the damages recovered, the court would be undermining the purpose of Section 1988 which is to insure that lawyers are willing to represent persons with ligitimate civil rights grievances even though they may not be able to afford legal counsel. By accepting any particular civil rights case for a percentage of the damages recovered, an attorney is making a financially motivated decision to collect as payment of his fees, a percentage of the damages recovered as opposed to a reasonable fee set by the court. As very adequately set out by the Fifth Circuit in the case at bar, neither the appellant nor Congress' purpose in enacting Section 1988 are disserved by a decision not to award a fee greater than the litigant is contractually bound to pay. The Fifth Circuit stated:

> "In reaching this conclusion, we disserve neither the appellant nor Congress' intention to foster the enforcement of the Civil Rights Act by means of fee-shifting. The appellant's contractual obligation to his attorney has been fulfilled and he has received a favorable judgment at no cost to himself. The appellant's attorney may not decide to accept another civil rights case on a contingent fee contract, but the outcome of this case should not be a disincentive to handling civil rights cases upon different contractual terms." *Blanchard v. Bergeron*, 831 F. 2d 563 5th Cir. 1987 (reprinted in the appendix at pgs. 1A-5A)

In *City of Riverside*, supra, this Court was concerned that contingency fee arrangements that make legal services available in ordinary personal injury cases would

not encourage lawyers to accept all meritorious civil rights cases as many involve substantial expenditures of time and effort, but produce only small monetary recoveries. While Congress was concerned with providing reasonable fees to successful civil rights plaintiffs, there was never an intention to interfere with an individual's right to enter into an attorney-client relationship in the "private market". As this Court so aptly noted in *Pennsylvania v. Delaware Valley Citizen's Council*, ___ U.S.___, 106 S. Ct. 3088 (1986):

> "These statutes (fee shifting statutes) were not designed as a form of economic relief to improve the financial lot of attorneys nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client. Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws."

If plaintiffs, such as Arthur Blanchard, are able to obtain counsel to represent them on a contingency providing for the payment of attorney's fees on a specified proportion of the amount of damages recovered, then in those cases, the attorney can not be said to have relied on the statutory assurance that he would be paid any different fee under a fee shifting statute. As the Fifth Circuit noted in the instant case, "To the extent that fee awards in civil rights cases are intended to reflect fees charged "in the marketplace" for legal services, enforcement of the contingent fee contract here is appropriate." *Blanchard v. Bergeron*, 831 F. 2d 563 (5th Cir. 1987). The contract is

certainly evidence of the parties fee expectations at the inception of the case.

II. TIME BILLED BY LAW CLERKS OR PARALEGALS IS INCLUDED WITHIN THE CONTINGENCY FEE.

In placing a cap upon the attorney's fees recoverable by the plaintiff, the Fifth Circuit did not allow an award for legal support personnel but rather held that any payment due them was naturally included within the contingency fee, *Blanchard v. Bergeron*, supra. The plaintiff entered into a contingency fee contract with his attorney whereby he agreed to pay to his attorney, after trial, 40% of the amount recovered. The contract does not provide for the additional payment of law students, law clerks or paralegals. Because the plaintiff is not bound under the contingency fee contract to pay additional sums to his attorney for legal support personnel, any recovery by the plaintiff or his attorney for such payment would be a windfall which Congress specifically intended to prohibit.

The Fifth Circuit's finding is clearly limited to the situation where the plaintiff's attorney accepts the case on a contingency, with payment based on a specified percentage of the damages recovered. Certainly no evidence was presented at the trial level to indicate that the parties at any time intended that plaintiff would pay his attorney additional sums for time expended by legal support staff. Appellant respectfully requests that this court not make a determination with such a scant record on this issue.

Additionally, as was so aptly noted in *Ramos v. Lamm*, 713 F. 2d 546 (10th Cir. 1983), in order to award separate compensation for the work of law clerks and paralegals, the Court must make a determination as to whether or not such services are normally part of the office overhead in the area and thus already reflected in the normal billing rate established by the court. It is suggested to the Court that in contingency fee cases, the fees of paralegals and law clerks are reflected in the percentage of recovery and should not be billed separately.

CONCLUSION

Any recovery by the plaintiff or his attorney of fees in excess of the amount which the plaintiff had obligated himself to pay his attorney would be a windfall and contrary the intent of Congress in passing 42 U.S.C. 1988. By affirming the Fifth Circuit decision, this court would not disserve the appellant nor Congress' intention to foster the enforcement of the Civil Rights Act. The "cap" placed by the Fifth Circuit will not act as a disincentive to attorneys handling civil rights cases under different contractual terms.

The recovery of additional sums for the time billed by law clerks and paralegals is naturally included in the contingency fee and any additional sums would be a

windfall to the plaintiff or his attorney in derogation of Congress' intent in passing the Civil Rights Attorney's Fees Act of 1976.

RESPECTFULLY SUBMITTED,

EDMOND L. GUIDRY, III
GUIDRY & GUIDRY
Attorneys at Law
324 South Main Street
St. Martinville, La. 70582
(318) 394-7116